Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977.

No. 77-299

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A CORPORATION,

Petitioner,

vs.

BRANDT ELEVATOR, INC., L. H. GRAIN CO., AND JOHNSON GRAIN & MILLING CO.,

Respondents.

BRIEF IN OPPOSITION

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Respondents.

BRIEF IN OPPOSITION

Respondents assert this Court may lack jurisdiction to grant the Writ petitioner seeks, and even if the Court has such jurisdiction, it should exercise its discretion to deny the writ.

OPINIONS BELOW

Respondents accept petitioner's presentation.

JURISDICTION

The petition asserts final judgment of the Supreme Court of Iowa was rendered on May 25, 1977, and that this Court has jurisdiction to review that judgment by Writ of Certiorari under 28 U.S.C. §1257 (3). In fact, the decision of the Iowa Supreme Court merely reversed the granting by the trial court of the motion for summary judgment of the defendant (petitioner herein), which motion was based upon only one of several affirmative defenses set forth by the then defendant to the claims of the plaintiffs (respondents herein). By virtue of the present status of the case in the State court, and as more particularly set forth in the arguments in opposition, infra, a question exists whether this Court has jurisdiction under the above referenced statute due to the lack of any final judgment or decree, as required thereby.

QUESTION PRESENTED

The Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §20 (11) renders a common carrier liable for the full actual loss, damage or injury to property it receives for transportation. In the instant case the stipulated facts indicate the shipper, L. H. Grain Company, shipped 120,000 pounds of soybeans from Dolliver, Iowa, to Beaumont, Texas, but the amount of grain

delivered totaled only 117,360 pounds. The freight rate applicable to this minimum weight was .476625/cwt and the railroad, as always, collected the full freight charge of $571.95 (120,000 pounds x .476625/cwt) based upon the minimum weight rather than actual destination weight. As a result, the shipper suffered the loss of the "minimum weight penalty" of $10.97 representing the difference between the product of the weight of the soybeans shipped and the weight of the soybeans delivered (after allowance for weight shrinkage).

The Supreme Court of Iowa held that where a shipper receives only the point of shipment value of a lost commodity rather than its destination value, a measure of damages which permits him to recover freight charges paid on the lost portion of the shipment as compensation for his "full actual loss" is proper. The question addressed to this Court by the petitioner is whether the payment by a common carrier of a "minimum weight penalty" constitutes a rebate of freight charges prohibited by the Elkins Act, 49 U.S.C. §41 and the Interstate Commerce Act, 49 U.S.C. §§2 and 3(1). These respondents substantially agree with that statement of the issue, but it is overly broad to the extent that it fails to consider the opinion of the Supreme Court of Iowa was limited to the situation in which the shipper receives only the point of shipment value of the lost commodity rather than its destination value.

STATUTES INVOLVED

The respondents agree that the statutes set out by the petitioner are involved in this matter. However, since the respondents believe there exists a question whether this Court is without jurisdiction to grant certiorari at this time, a consideration of 28 U.S.C. §1257(3) is also mandated. That statute is set forth in Appendix A at p. A1.

STATEMENT OF THE CASE

The respondents agree with the statement of facts set out in the petition for a Writ of Certiorari. The statement is, however, incomplete with respect to certain facts which raise a question of this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). Supplementation is, therefore, required.

As the petition indicates, 60 grain dealers filed action against the transportation company, and each asserted three theories of recovery. Count I sought recovery upon a theory of negligence, Count II upon a theory of breach of contract and Count III upon a theory of statutory liability under the Carmack Amendment. Prior to answer, the defendant transportation company filed a document entitled, "Combined Motions to Dismiss, Strike and for More Specific Statement." Insofar as the document constituted a motion to dismiss and a motion

to strike it is set out in Appendix B at pp. B1 - B3. The gravamen of each motion was that Counts I and II of each claim must be struck as fatally inconsistent with Count III, which purported to state a claim for relief under the Carmack Amendment, which, it was alleged in the motions, is the exclusive ground for liability of a common carrier for damage to a shipment transported in interstate commerce.

By ruling of January 4, 1973, the district court, by Harry Perkins, Judge, overruled the company's motions to dismiss and to set aside "on each of the grounds urged in support thereof." A copy of that ruling is contained in Appendix C at p. C1.

Later the transportation company filed answer and therein set up nine affirmative defenses to the various claims of the plaintiffs. Those divisions of the answer which consist of affirmative allegations are set out in Appendix D at pp. D1 - D9. It is pertinent to note that one division thereof reasserts the allegation that the liability of a common carrier for damage to a shipment transported in interstate commerce is determined exclusively under the provisions of the Carmack Amendment, two divisions assert the plaintiffs' claims are barred by statutes of limitations contained in 49 U.S.C. §16(3) and one division raises the question petitioner now asks this Court to address. The plaintiffs by way of reply denied the legal

effect alleged by the transportation company in each division.

The transportation company's motion for summary judgment, which was sustained by the trial court, but effectively overruled on appeal by the Supreme Court of Iowa, was based upon only one of the affirmative defenses set up in the answer -- the assertion that the claims for relief were claims for rebates of freight charges on shipments of property transported in interstate commerce and barred by the provisions of 49 U.S.C. §§2, 3(1) and 41. The decision of the Supreme Court of Iowa, therefore, disposed of only one issue and left the remainder of the case, including trial and resolution of the possible remaining issues.

ARGUMENTS IN OPPOSITION TO THE GRANTING OF THE WRIT

I.

This Court May be Without Jurisdiction to Issue the Writ.

The petitioner has asserted that the "judgment" of the Supreme Court of Iowa was rendered on May 25, 1977, and is final, and that this Court has jurisdiction to review the "judgment" by Writ of Certiorari under 28 U.S.C. §1257(3). This assertion must be questioned.

In material part, the statute provides:

"Final judgments on decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"*

"*

"(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or Commission held or authority exercised under, the United States."

Petitioner asks the Court to review a decision which may not meet the finality requirement of the above statute.

The only effect of the decision of the Iowa Supreme Court in this matter was to disallow as a defense the affirmative allegations of Division LXV of the transportation company's answer. The remainder of the case, including affirmative defenses in eight other divisions, has yet to be resolved and trial has not even commenced.

Admittedly this Court has recognized four classes of situations in which the finality rule is relaxed due to compelling

circumstances, but the respondent questions whether the instant case is one in which such treatment would be appropriate. As noted by this Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477-478 (1975):

> "In most, if not all, of the cases in these categories, these additional proceedings (in the lower State courts) would not require the decision of other federal questions that might also require review by the court at a later date, and immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,' (citation omitted) as well as precipitate interference with state litigation."

In the present case there remains at least one federal question which might be decided in the proceedings pending in the Iowa District Court. It is true that the facts adduced at trial, and their legal effect, could render unnecessary any decision as to the exclusivity of the Carmack Amendment as the respondents' remedy, but the possibility still exists, especially if the petitioner is able to prove, by way of defense, that the claims of the shippers were untimely presented under the Interstate Commerce Act. In such a situation, the court might be forced to address whether the federal legislation precludes common law recovery.

If the Court would deem review of the question at hand appropriate when this case has become final and all pending federal questions can be addressed, that review will be available. The fact the highest state court in a second appeal refuses to reconsider the federal question decided in the first appeal does not deprive this Court of jurisdiction to review the second judgment. Urie v. Thompson, 337 U.S. 162, 172-173 (1949). Even if the State court on the second appeal designates its earlier ruling as the law of the case, this Court may reexamine the earlier ruling. Reece v. Georgia, 350 U.S. 85, 87 (1955).

II.

The Court Should Await the Benefit of Decisions of Other Appellate Courts Before Addressing the Issue.

Petitioner contends the question of which it seeks review is of far-reaching importance and great and recurring significance. Respondent respectfully asserts that this Court should await the benefit of decisions of other appellate courts before addressing the issue.

Research reveals hardly any applicable case authority. Apparently the issue the petitioner poses has spawned very little litigation. This Court should defer any consideration of the matter until it has the benefit of the treatment and analysis of other courts

regarding the question. This would have the further advantage of bringing the scope of the issue into better focus.

Petitioner has not asserted any significant conflict between the Circuit Courts of Appeal or other high appellate courts. Indeed, no significant conflict exists. This Court should await further development before treating an issue the scope of which is simply not clear at this time.

III.

The Supreme Court of Iowa Carefully considered the Issue and Arrived at the Correct Decision.

Petitioner asserts that the Supreme Court of Iowa decided an important question of federal law which has not been settled by this Court, and that it erroneously interpreted the Carmack Amendment and the Elkins Act of the Interstate Commerce Act. With these contentions the respondents disagree.

Petitioner attempts to distinguish Pennsylvania R. Co. v. Olivit Bros., 243 U.S. 574 (1917), upon which the Supreme Court of Iowa admittedly placed some reliance, from the situation to which the Iowa high court addressed itself. In fact, petitioner, presents distinctions without legal difference. At pages seven and eight of its petition, the transportation company asserts that since it paid respondents the same price per bushel for

the lost shipments as the consignee contracted to pay for the delivered grain, the respondents were made whole. The stipulated facts clearly indicate they were not made whole, but rather were denied compensation for their loss representing the minimum weight penalty.

Secondly, the petitioner makes some point of the fact the consignee elected to pay the lower freight rate, and appears to argue this somehow prevents the consignor from making a subsequent claim for the minimum weight penalty. This simply does not affect the legal issues addressed in Olivit, and provides no support for the petitioner, because the effective rate is still higher on a partially lost shipment than a full shipment, and a loss is thereby sustained.

Furthermore, petitioner argues the minimum weight penalty was a creation of the respondents and the consignee, that it was merely the creation of an "actual loss" through private contracts and that the petitioner was not a party to the contract in question or a subscriber to Rule 23 of the Grain and Feed Dealers National Association. The foregoing contentions fail to withstand logical scrutiny. The private contract, and Rule 23, did not "create" an actual loss. The actual loss arose independent of the contract. Rather, the contract merely placed the burden of the loss on, and gave the right to make a claim for the same to, the respondent,

the consignor. In no sense did this contractual adjustment of relative rights create a loss which did not exist independent of the contract.

With the asserted distinctions between Olivit and the case at bar being more imagined than real, the former stands as square authority for the decision of the Supreme Court of Iowa. The issue addressed in Olivit was framed by the Court at page 585 of 243 U.S. as follows:

> "The fourth contention is that plaintiff should not recover as part of its damages the freight paid upon delivery at destination.
> "The contention is rested upon the prohibition of the Interstate Commerce Act against deviation from the filed tariffs and schedules and against rebates and undue preferences and discriminations. ***."

At page 586 the Court continued:

> "(I)t was agreed at the trial that the proper measure of damages was to be computed upon the basis of the value of the property at the place and time of shipment***. As plaintiff further says, to recover the damages sustained by it, based upon this value, plaintiff must receive from defendant the difference between this value and

> the proceeds of sale, and the freight paid. In this we concur, and therefore there was no error in including in the recovery such freight."

Olivit stands as convincing authority for the decision of the Iowa Supreme Court. On page eight of its petition, the transportation company suggests that Olivit was somehow eroded by this Court's decision three years later in Chicago, M. & St. P. Ry. Co. v. McCaull-Dinsmore Co., 253 U.S. 97 (1920). Respondents do not understand in what manner this might be, nor is it clear from the petition. The Supreme Court of Iowa was not unaware of the existence of McCaull-Dinsmore. In fact, the Iowa court quoted the case in its opinion for the proposition that the common law measure of damages was incorporated into the provisions of the Interstate Commerce Act. See petition, Appendix A, p. A-19.

The respondents have little quarrel with most of general propositions advanced by the cases cited in Division III, Reasons for Granting the Writ, in the petition. Thus, it is not contended here that the petitioner can properly give a "rebate" to the respondents. Nor is it contended that the respondent can lawfully discriminate between shippers or deviate from published tariffs. The authority advanced, however, is inapposite to the situation in this action, and petitioner begs the true question of whether a minimum weight penalty is

a proper element of damage under the Carmack Amendment.

First, a shipper who is truly damaged by a railroad's breach of its shipping contract receives no rebate or preference when the railroad pays the amount of loss. Only an overpayment would constitute a rebate or preference. See Southern Pacific Co. v. Miller Abattoir Co., 454 F. 2d 357 (3d Cir. 1972).

Petitioner appears to argue that since the tariff provides a rate based on minimum weight, the railroad cannot charge less than or deviate from the minimum weight even if part of the shipment is lost. The simple answer to this contention is that the railroad did collect, and has been collecting, the minimum weight charge. There is no deviation from the published tariff, and any subsequent payment of a claim cannot change that fact.

Finally, the respondents object to the petitioner's assertion on page 11 of the petition that the agreement between the respondent and its consignor in the stipulated fact situation "was created for the benefit of shipper and consignee in order to gain a lower shipping rate than the published tariff rate." There is no support whatsoever in the record before this Court or the Iowa courts that the contract was for the purpose of circumventing the tariff rate, or intended by the parties to accomplish that result. The respondents respectfully assert it

would not be proper for the Court to consider that assertion, and reassert that the contract between the Consignor and Consignee merely apportioned the loss, and did not create a loss.

The respondents believe further affirmative discussion of the merits is unnecessary. The Supreme Court of Iowa carefully considered the issue presented and arrived at the proper result, one which is in harmony with both the Carmack Amendment and the Elkins Act.

CONCLUSION

This Court is faced with a threshold question of whether it has jurisdiction to grant the requested Writ of Certiorari under 28 U.S.C. §1257(3). Assuming arguendo that the Court does have jurisdiction, the Court would, nonetheless, benefit by further treatment and analysis of other appellate Courts. Further, the Supreme Court of Iowa carefully considered the issue and arrived at the proper result.

Respectfully submitted,

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APPENDIX A

§1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

IN THE DISTRICT COURT OF THE STATE
OF IOWA IN AND FOR POLK COUNTY

APPENDIX B

MOTIONS FILED IN DISTRICT COURT
BY THE PETITIONER

MOTION TO DISMISS

COMES NOW the defendant, Chicago and North Western Transportation Company, successor in interest to Chicago and North Western Railway Company, and, pursuant to the provisions of Iowa R. Civ. P. 111 and 104(b), moves the court to dismiss Counts I. and II. of each Division of the Petition at Law herein, as amended, for failure to state claims on which any relief can be granted and, as grounds therefore respectfully states:

1. Count I. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged breach of contract.

2. Count II. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged negligence.

3. Count III. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon the provisions of the Carmack Amendment, 49 U.S.C.A. §20 (11).

4. The Carmack Amendment, 49 U.S.C.A. § 20 (11), provides, in part, as follows:

> Any * * * railroad * * * receiving property for transportation from a point in one State * * * to a point in another State * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * *.

5. The provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11), by its terms, are applicable only to shipments transported by a common carrier in interstate commerce.

6. Under the allegations of Count III. of each Division of the Petition at Law herein, as amended, the shipments at issue herein must be considered to have been transported by a common carrier in interstate commerce.

7. The liability of a common carrier for damage to a shipment transported in interstate commerce is determined exclusively under the provisions of the Carmack Amendment, 49 U.S.C.A. §20 (11).

8. By reason of the foregoing, Counts I. and II. of each Division of the Petition at Law herein, as amended, do not state claims on which any relief can be granted for the reason that the same are attempts to plead theories of liability which are fatally inconsistent with the liability imposed by the Carmack Amendment.

MOTION TO STRIKE

Division I.

COMES NOW the defendant, Chicago and North Western Transportation Company, successor in interest to Chicago and North Western Railway Company, and, pursuant to the provisions of Iowa R. Civ. P. 111 and 113, moves the court to strike Count I. of each Division of the Petition at Law herein, as amended, for the reason that the same is improper and unnecessary matter and, as grounds therefore, respectfully states:

1. Defendant incorporates herein by reference the statements contained in paragraphs 1, 3, 4, 5, 6 and 7 of the foregoing Motion to Dismiss.

2. By reason of the foregoing, Count I. of each Division of the Petition at Law herein, as amended, is improper and unnecessary matter for the reason that the same is an attempt to plead a theory of liability which is fatally inconsistent with the liability imposed by the Carmack Amendment.

Division II.

COMES NOW the defendant, Chicago and North Western Transportation Company, successor in interest to Chicago and North Western Railway Company, and, pursuant to the provisions of Iowa R. Civ. P. 111 and 113, moves the court to strike

Count II. of each Division of the Petition at Law herein, as amended, for the reason that the same is improper and unnecessary matter and, as grounds therefore, respectfully states:

1. Defendant incorporates herein by reference the statements contained in paragraphs 2, 3, 4, 5, 6 and 7 of the foregoing Motion to Dismiss.

2. By reason of the foregoing, Count II. of each Division of the Petition at Law herein, as amended, is improper and unnecessary matter for the reason that the same is an attempt to plead a theory of liability which is fatally inconsistent with the liability imposed by the Carmack Amendment.

the Carmack Amendment.

APPENDIX C

RULING OF TRIAL COURT ON MOTIONS TO DISMISS AND STRIKE

Defendants combined motions are ruled upon as follows:

Motion to Dismiss - Defendants motion to dismiss is overruled on each of the grounds urged in support thereof.

Motion to Strike - Defendants motion to strike is overruled on each of the grounds urged in support thereof.

Motion for more Specific Statement - Defendants motion for more specific statement is sustained. The court in so ruling recollects that at the hearing on this motion counsel for the parties agreed that certain of the requested information could be or had been furnished informally. The court will consider any particular item that cannot be agreed upon by the parties.

Harry Perkins
Judge

APPENDIX D

AFFIRMATIVE DEFENSES IN DISTRICT COURT RAISED BY THE PETITIONER

DIVISION LXI.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. Count I. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged breach of contract.

2. Count II. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon alleged negligence.

3. Count III. of each Division of the Petition at Law herein, as amended, purports to allege a claim for relief against the defendant based upon the provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11).

4. The Carmack Amendment, 49 U.S.C.A. § 20 (11), provides, in part, as follows:

> Any * * * railroad * * * receiving property for transportation from a point in one State * * * to a point in another State * * * shall issue

a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * *.

5. The provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11), by its terms, are applicable only to shipments transported by a common carrier in interstate commerce.

6. Under the allegations of Count III. of each Division of the Petition at Law herein, as amended, the shipments at issue herein must be considered to have been transported by a common carrier in interstate commerce.

7. The liability of a common carrier for damage to a shipment transported in interstate commerce is determined exclusively under the provisions of the Carmack Amendment, 49 U.S.C.A. § 20 (11).

8. By reason of the foregoing, Counts I. and II. of each Division of the Petition at Law herein, as amended, do not state claims on which any relief can be granted for the reason that the same are attempts to plead theories of liability which are fatally inconsistent with the liability imposed by the Carmack Amendment.

WHEREFORE, defendant prays that Counts I. and II. of Divisions I. - LX., inclusive, of the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. The claims for relief alleged in the Petition at Law filed herein, as amended, are claims for loss of and/or damage to shipments of property transported in interstate commerce.

2. The claims for relief alleged in the Petition at Law filed herein, as amended, were not filed with the Interstate Commerce Commission within two years from the time the same accrued.

3. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred by the statute of limitations contained in 49 U.S.C.A. § 16 (3)(b).

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXIII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively

alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXII hereof.

2. Said shipments of property were transported in interstate commerce under written agreements known as Uniform Straight Bills of Lading or Uniform Order Bills of Lading which contained the following provision:

> As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property * * * and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

3. The claims for relief alleged in the Petition at Law filed herein, as amended, were not filed and/or suit was

not instituted thereon within the times specified in the Uniform Straight Bills of Lading or Uniform Order Bills of Lading.

4. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred for failure to comply with the contractual condition precedent contained in the Uniform Straight Bills of Lading or Uniform Order Bills of Lading.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXIV.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. The claims for relief alleged in the Petition at Law filed herein, as amended, are claims for the overcharge of freight charges on shipments of property transported in interstate commerce.

2. The claims for relief alleged in the Petition at Law filed herein, as amended, were not commenced as actions at law nor was complaint filed thereon with the Interstate Commerce Commission within three years from the time the same accrued.

3. By reason of the foregoing, the

claims for relief alleged in the Petition at Law filed herein, as amended, are barred by the statute of limitations contained in 48 U.S.C.A. § 16 (3)(c).

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXV.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein, by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. The claims for relief alleged in the Petition at Law filed herein, as amended, are claims for rebates of freight charges on shipments of property transported in interstate commerce.

2. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred by the provisions of 49 U.S.C.A. §§ 2, 3(1) and 41.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXVI.

COMES NOW the defendant, Chicago and North Western Transportation Company,

and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXII. hereof.

2. The claims for relief alleged in the Petition at Law filed herein, as amended, were not liquidated or certain.

3. Subsequent to the accrual of the claims for relief alleged in the Petition at Law filed herein, as amended, and prior to the date of filing of the Petition at Law herein, plaintiffs and defendant orally agreed to compromise, adjust and settle said claims for relief, defendant has paid to plaintiffs the sums so agreed upon and plaintiffs have accepted the said sums.

4. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by accord and satisfaction.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXVII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion

Elevator Co., et al., affirmatively alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXII. hereof.
2. Defendant incoporates herein by reference the allegations contained in paragraphs 2 and 3 of Division LXVI. hereof.
3. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by compromise and settlement.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXVIII.

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al., affirmatively alleges:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXIV. hereof.
2. Defendant incorporates herein by reference the allegations contained in paragraphs 2 and 3 of Division LXVI. hereof.
3. By reason of the foregoing, the

claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by accord and satisfaction.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DIVISION LXIX

COMES NOW the defendant, Chicago and North Western Transportation Company, and, for its further answer to the Petition at Law filed herein by the plaintiffs, Albion Elevator Co., et al, affirmatively alleged:

1. Defendant incorporates herein by reference the allegations contained in paragraph 1 of Division LXIV. hereof.
2. Defendant incorporates herein by reference the allegations contained in paragraphs 2 and 3 of Division LXVI. hereof.
3. By reason of the foregoing, the claims for relief alleged in the Petition at Law filed herein, as amended, are barred and discharged by compromise and settlement.

WHEREFORE, defendant prays that the Petition at Law filed herein, as amended, be dismissed at plaintiffs' costs.

DAVIS, JOHNSON, BURT & DAVIS

By

/s/ Frank W. Davis, Jr.

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